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Supreme Court of the United States.

OCTOBER TERM, 1899.

Filed April 12, 1900.

No. 244.

THE YAZOO AND MISSISSIPPI VALLEY RAILROAD COMPANY ET AL.,
Plaintiffs in error,
vs.
WIRT ADAMS, State Revenue Agent.

In error to the Supreme Court of the State of Mississippi.

REPLY BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

WILLIAM D. GUTHRIE,
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For Plaintiffs in error.

JAMES FENTRESS,
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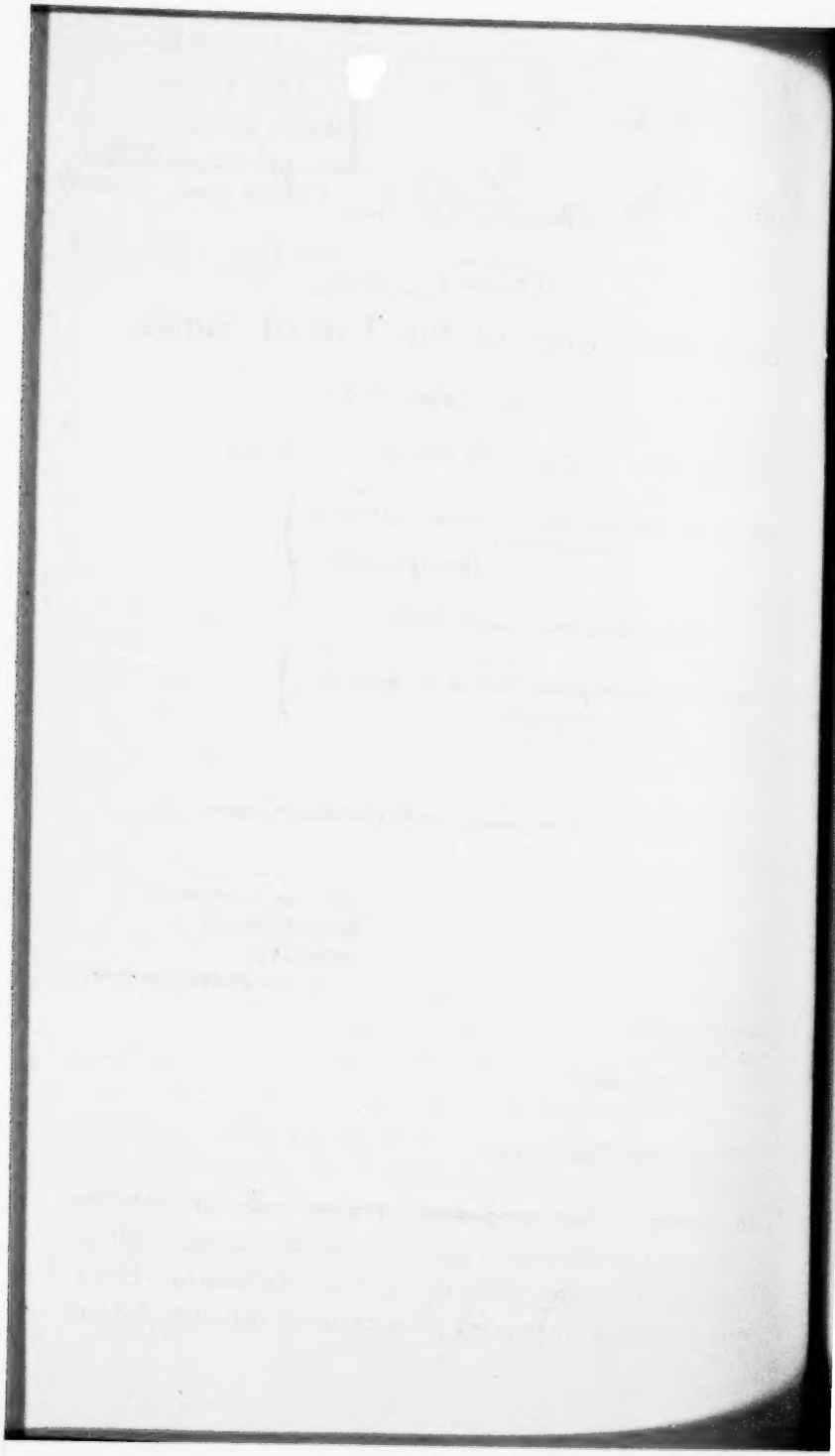
WASHINGTON, April 11, 1900.



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I.

Four briefs have so far been filed on behalf of the defendant in error, and one pamphlet, in addition to the briefs filed on the motion to dismiss. The principal points made in these new briefs bear upon the question of jurisdiction, which, it is considered, are sufficiently discussed in the original brief filed on behalf of the plaintiffs in error. In one of the briefs, however, an elaborate argument is presented to establish a possible non-federal ground of decision by showing what the actual cost of construction was and that the company was no longer entitled to the appropriation of taxes because its profits enabled the declaration and payment to the stockholders of an annual dividend of eight per cent. on its capital stock over and above the payment of its debts and liabilities, although concededly no such dividend has ever been paid. In answer to this suggestion, it need only be said that this question was not litigated on the second trial, and, as matter of fact, the plaintiffs in error, defendants below, were expressly precluded from showing that they did not

come within the scope of the eight per cent. proviso when their pleas setting forth the contract under section 21 were stricken out as constituting no defense. The testimony to which reference is made in the principal brief now filed on behalf of the defendant in error in this court was taken on the first trial, where this issue was litigated at length; but on the second trial no evidence whatever was taken upon the question of the amount of the profits, nor was any such point then litigated or considered either in the court of original jurisdiction or on the appeal to the Supreme Court of Mississippi. Moreover, as matter of fact, on the first trial the jury found in favor of the railroad company on this question of the profits for the years 1892, 1893 and 1894, and for the revenue agent for the year 1895. The Supreme Court of Mississippi set those findings aside on the ground that they were inconsistent (record, p. 680), ordered a new trial, and declined to consider the eight per cent. clause because it had decided that the whole of section 21 was invalid, which, of course, rendered the eight per cent. proviso entirely immaterial.

II.

In the briefs filed on behalf of the defendant in error, it is still insisted that it was the intention of the legislature in and by the provision for the appropriation of taxes to create an exemption in violation of the constitution of 1869. The opinion in *Houston & Texas Central Railroad* v. *Texas*, just filed in this court (March 26, 1900), but not yet published, ought to be a sufficient answer to this contention. In that case, as in the case at bar, the court was asked to find that the wording of the statute was a mere cover for an intention to effectuate what was pro-

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hibited by the state constitution. The court held this contention to be unsound in language which is equally applicable to the present case. Thus, among other things, Mr. Justice Peckham said:

> "The question whether the legislature so intended is one to be decided by an inspection of the act under which they were issued, and possibly by reference to the text of other acts of the legislature enacted at or about the same time. . . . If any fair doubt could arise, it should be solved in favor of the validity of the paper. There must be an intention on the part of the legislature that the paper should circulate as money. *There must, in other words, be an intention to violate the constitution.*
>
> "A deliberate intention on the part of a legislative body to violate the organic law of the State under which it exists and to which the members have sworn obedience, is not to be lightly indulged. The existence of such intention should be proved beyond doubt or cavil from the very acts themselves which are under discussion, and if it be reasonably possible to so construe them as to render them valid, a proper respect for the legislative department calls for such construction rather than one which invalidates them, because they were enacted with a direct purpose to violate the state constitution."

This authority is almost on all fours in favor of the contention of the plaintiffs in error that, if the fair and reasonable import of the language used in section 21 is not to create an exemption in violation of the state constitution, the court will not assume the existence of any such unlawful intention, but will uphold the legislation as intended to accomplish in good faith what it purports to enact, namely, an appropriation of taxes in aid of a necessary public improvement.

The argument is also advanced that, because the charter of 1882 was enacted and accepted after the decision in the *Mississippi Mills* case (1878), it must be interpreted as if that decision were part of the charter itself; and that, as that decision held a somewhat similar form of legislative contract to constitute or be equivalent to a repealable

exemption, the charter now before the court must also be conclusively assumed to constitute a repealable exemption. This is hardly a candid argument. The revenue agent has entirely repudiated the *Mississippi Mills* case and the court below has completely overruled it (record, pp. 662, 681). The state revenue agent cannot in one breath repudiate a prior decision and have it overruled so far as it stands in the way of a recovery against the railroad companies or tends to uphold their position, and in the very next breath insist that the decision is to be given full faith and credit in so far as it militates against the railroad companies. In a word, it cannot be that the decision is to stand so far as it is against the railroad companies, but is to be set aside and disregarded so far as it is inconsistent with the revenue agent's present argument. If the revenue agent had been willing to concede that the legislature in 1882 had constitutional power to exempt, and that the taxes prior to 1892 were, therefore, validly released, there would be some justice and fairness in his present argument; but we know that he is suing for taxes prior to 1892 on the ground that the decisions in the *Mississippi Mills* and cognate cases were wholly erroneous and that the legislature had no power to grant any exemption. Having succeeded in his contention that the prior decisions were erroneous, and the court below having in the case at bar expressly overruled them, the case comes before this court as if no such decisions had been rendered. It would indeed be an astonishing feature on the oral argument of these cases if the revenue agent should now concede that there was full power to exempt under the constitution of 1869, as decided in the *Mississippi Mills* case, and that that decision was after all correct. But this court

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would even then undoubtedly say that a litigant cannot thus blow hot and cold at the same time, and that it is too late to take any such stand. A party cannot thus change his ground and put his case upon another and different consideration. He cannot be permitted thus to mend his hold, but is estopped from doing so by all the principles and considerations which make an argument in this court a frank and fair struggle after the truth.

Moreover, section 21 differs in a very material respect from the provision before the state court in the *Mississippi Mills* case, which was there held to be repealable. In section 21 it is expressly provided that the "*agreement is irrepealable*," while no such irrepealable agreement was in the statute before the court in the prior case.

III.

The present action, it is important to bear in mind, is for back taxes, and not for taxes for current years as they accrued. The contract as between the state and the railroad company was executed and not still executory when these suits were brought. Such contract having been executed and the state officers having given the receipt for taxes directed by the statute, the state cannot now repudiate the transaction and recover again. In the case at bar, this point was distinctly raised, in one of the special pleas which were stricken out, in respect of the taxes of 1892, 1893, 1894 and 1895 (record, *e. g.*, p. 568). This special plea, setting forth that the contract was no longer executory, but executed as to the taxes for 1892 to 1895, inclusive, was with the other pleas made applicable to the taxes for the subsequent years, by the stipulation and order made when the suits were consolidated (*id.*, p. 610). The plea is as follows:

"That, proceeding under said section five, adopting said section twenty one, and in conformity thereto, as to all of the railroads and property in said declaration mentioned (except as to the said special charter and Helena branch and Bayou Sara branch) and all of the taxes payable thereon, as set forth in said declaration, during the said year 1892, the said Louisville, New Orleans & Texas Railway Company and the Yazoo & Mississippi Valley Railroad Company, in due and proper time during the years 1893, 1894, and 1895, *and in due and proper time the said last-named company paid said taxes to the full extent thereof* in the payment of debts and liabilities which the said Louisville, New Orleans & Texas Railway Company had incurred in the construction of said road and in payment of money borrowed by said last-named company to be used in such construction and so used and in payment of debts incurred by said last-named company in such construction, and also on due and proper time in each of said years respectively the Yazoo & Mississippi Valley Railroad Company delivered to the tax collector of each and every of said counties an affidavit, made by the president of said company or by the cashier thereof, that the amount of said taxes had actually and in good faith been paid and applied by said company (or as to the year 1892 by said Louisville, New Orleans & Texas Railway Company) during said years 1892, 1893, 1894, and 1895 in payment of debts incurred by the said Louisville, New Orleans & Texas Railway Company in the construction of its railroad or money borrowed by said last-named company upon lands or otherwise to be used in constructing said road or paying debts incurred by said last-named company in constructing the same, *whereupon the said several tax collectors did, each and every one, give to defendant a receipt in full for the amount of said taxes respectively, excepting as aforesaid.*" [1]

The striking out of this plea, of course, prevented proof as to its allegations.

The fact that the contract was thus executed brings the case clearly within the decision in *Houston & Texas Central Railroad* v. *Texas*, to the effect that, although the original contract of appropriation by the state may have been unconstitutional, yet if that contract has been

[1] The exception was as to certain branch roads, the taxes on which had been paid in cash and are not in controversy.

performed in good faith by the railroad company and the state and municipal officers have given receipts for taxes, this is a good defense, and a recovery cannot again be had for the same taxes.

IV.

One of the briefs filed makes the point that the Louisville, New Orleans and Texas Railway Company had no independent authority to consolidate, and that the only authority for the merger or consolidation of 1892 must be deemed to spring from the charter of the Yazoo Company. This, it is submitted, is quite incorrect, as will be seen by reference to the statement of facts in the original brief and appendix filed on behalf of the plaintiffs in error.

The defendant's proposition seems to be that, by the consolidation of 1884 resulting in the Louisville, New Orleans and Texas Company, the pre-existing authority to consolidate was exhausted; that the consolidated company did not acquire the rights and powers of consolidation vested in its constituent companies, and that it was consequently without power to consolidate anew. It is only necessary to say that this proposition contradicts the express provision of the authorizing statute. That statute provides in express terms (appendix to original brief, pp. v and vi):

> "That the company so formed by such consolidation . . . . shall have, enjoy and possess all the rights, ways, privileges, franchises, property, grants and immunities which are now possessed by the companies which may enter into such consolidation, as fully as though the same were conferred specially in this act, and to that end the charters of said consolidating companies shall be taken and held to be a part of this act."

It is further contended by the defendant in error that under the authority to consolidate conferred by section 25 of the Baton Rouge charter, which was imported into the charter of the Louisville, New Orleans and Texas Com-

pany by the language last above quoted, there was no authority to consolidate except with a connecting line. To this contention there are two complete answers: First, the argument confines itself to the authority to consolidate derived through section 25 of the Baton Rouge charter, and wholly ignores the authority conferred by section 16 of the Memphis and Vicksburg charter, in which there is no such restriction. Secondly, in the charter of the Baton Rouge Company the limitation, if it be such, in respect to a connecting railroad is clearly a limitation of authority to *purchase*, and there is no such restriction in connection with the power to consolidate, as will appear on reading the consolidation section, which confers a different authority altogether.

V.

The provision of the charter of the Yazoo and Mississippi Valley Company, which granted the power on its part to consolidate, contained, among other things, the following (appendix to original brief, pp. vi, vii):

> "Upon any such consolidation, the consolidated company shall have and enjoy all the property, rights, privileges, powers, liberties and immunities and franchises *herein granted;* but such consolidation shall not have the effect of exempting from taxation the railroad or property owned by such other consolidating company prior to its consolidation with the company hereby chartered; nor of exempting from taxation any property which the consolidated company may, after such consolidation acquire under the provisions of the charter of such other consolidating company."

It is now contended by the defendant in error that the effect of the words "herein granted" is to limit the rights of the consolidated company to the rights belonging to the Yazoo Company in exclusion of any rights belonging to any other constituent company, and therefore to exclude the transfer of the contract right to the appropriation of

taxes belonging to the Louisville, New Orleans and Texas Company. As well might it be argued—for it is in exactly the same words and sentence—that this language was intended to exclude from the consolidated company the property of the other constituent company or companies and all the rights and franchises which are essential to the operation of their roads. Thus, we would have a *reductio ad absurdum*. It must be perfectly obvious that the fair import of the provision above quoted, as well as the clear intention evidenced by the language used, is to provide for a transfer to the consolidated company of all the "property, rights, privileges," etc., existing in the Yazoo and Mississippi Valley Company at the time of the consolidation and that it could not have been the intention to exclude the consolidated company from the power to acquire and enjoy any "property, rights, privileges," etc., which the other constituent companies might possess at the time of the consolidation. Otherwise, of what use or sense would a consolidation be? If it had been the intention of the legislature that the consolidated company should only have the "property, rights, privileges," etc., then belonging to the Yazoo Company and that the "property, rights, privileges," etc., of any other constituent company should not pass, surely apt language expressing such an extraordinary intention and such an unheard of and incomprehensible provision would have been used.

Washington, April 11, 1900.

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